In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1412

ANTHONY MICHAEL GROSSO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge the validity of a court ordered wire interception on the ground that proper procedures were not followed within the Department of Justice for authorizing the submission to the court of the application for the wire interception order. They also contend that their conviction and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of conspiring with numerous others to conduct an illegal gambling business in violation of 18 U.S.C. 371 (count 1), and of conducting such a business in violation of 18 U.S.C. 1955 (count 2).[1] Anthony

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[1]Three other persons named in the indictment were severed. Over forty persons were named as conspirators but were not defendants.

Michael Grosso was sentenced to consecutive terms of five years' imprisonment on each count and fined $25,000. Samuel James Grosso was sentenced to consecutive terms of three years' imprisonment on count 1 and five years' imprisonment on count 2 and fined $25,000. Joseph Carmen Grosso was sentenced to concurrent three-year terms of imprisonment on each count and fined $5,000 on count 1 and $10,000 on count 2. Philomena Viola was given a suspended sentence on counts 1 and 2, and placed on probation for three years and fined $5,000 on count 1. Each petitioner was also fined his proportionate share of the costs of prosecution. The court of appeals affirmed (Pet. App. 20-22).

The evidence at trial, which depended in part upon evidence obtained by court authorized electronic interceptions, showed that petitioners conspired to and did violate 18 U.S.C. 1955 by engaging in a large-scale gambling operation that was illegal under state law.[2] They provided bets and payoffs based on numbers obtained through the daily transactions of the New York Stock Exchange as well as other numbers based upon race track results. The operation had been in substantially continuous operation for years, with a gross revenue well in excess of the statutory minimum of $2,000 per day (Pet. App. 12).

1. Prior to trial, petitioners moved to suppress evidence obtained from court ordered electronic surveillance on the ground that the applications for the orders were not properly authorized within the Department of Justice in accordance with 18 U.S.C.

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[2]Sections 4601 and 4607, Title 18, Purdon's Penna. Stats. Ann.

2516(1) and 2518(1) (Pet. App. 23-24). The district court granted petitioners' motion with respect to one surveillance because the application for the surveillance, and for a subsequent extension, had not been authorized either by the Attorney General or by any Assistant Attorney General specially designated by the Attorney General (Pet. App. 13). Petitioners contend that the district court erred in failing to suppress evidence received from an earlier surveillance, the application for which was personally authorized by the Attorney General under the Department of Justice's procedure as set forth in the briefs for the United States in *United States* v. *Giordano*, No. 72-1057, and *United States* v. *Chavez*, No. 72-1319, both decided May 13, 1974.

The government here showed by affidavits and answers to interrogatories that the application in question was personally authorized by Attorney General John N. Mitchell, who initialed the authorization memorandum. A letter was then dispatched to the attorney in the field notifying him that he was authorized to apply for the interception order; it erroneously indicated that Assistant Attorney General Will Wilson had authorized the application. This Court held in *United States* v. *Chavez, supra,* that such an error does not warrant suppression of the evidence obtained from the interception.

2. Petitioners also argue that 18 U.S.C. 371 and 18 U.S.C. 1955 do not charge different offenses, and therefore, under "Wharton's rule", it was improper to prosecute and punish them for both the conspiracy and the substantive offenses.[3] As petitioners point out, this

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[3]Since petitioner Viola's sentence on count 2 was suspended, it is not clear that she has been prejudiced by the court's refusal to apply Wharton's rule to her case.

issue is presented in a similar factual situation in *Iannelli* v. *United States,* No. 73-64, certiorari granted, May 28, 1974. Accordingly, it would be appropriate to defer disposition of this petition until after the decision in *Iannelli*, and then to dispose of it in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

DOJ-1974-06